

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

**JAMES P. KARTELL**  
**Petitioner**

**Civil Action No. 04-10917-WGY**

v.

**BRIAN BURGWINKLE**  
**Respondent**

**RESPONDENT'S MOTION TO DISMISS HABEAS CORPUS  
PETITION FOR FAILURE TO EXHAUST STATE COURT REMEDIES**

The respondent, through counsel, moves this Court to dismiss the writ of habeas corpus petition for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). In support of his motion, the respondent states that the petitioner has not exhausted any of the claims he raises in the state courts. Because the petitioner has yet to provide the state's highest court with the first opportunity to pass on the merits of his claims, this Court should dismiss the petition. *See* 28 U.S.C. §§ 2254(b)-(c). The respondent reserves the right to submit a memorandum raising additional defenses, if necessary.

In support of this motion, the respondent relies upon his memorandum of law, filed with this motion, as well as his Answer and Supplemental Answer, filed on June 10, 2004.

Respectfully submitted,

THOMAS F. REILLY  
ATTORNEY GENERAL

/s/ Daniel I. Smulow  
Daniel I. Smulow, BBO # 641668  
Assistant Attorney General  
Criminal Bureau

One Ashburton Place  
Boston, MA 02108  
(617) 727-2200, ext. 2949

Dated: June 22, 2004

**Certificate of Compliance with Local Rule 7.1(A)(2)**

I, Daniel I. Smulow, hereby certify that I telephoned Attorney Michael J. Traft, counsel for the petitioner, on June 22, 2004, but was unable to confer with him. In light of the nature of this motion, I presume that Attorney Traft and I would have been unable to resolve or narrow the issues.

/s/ Daniel I. Smulow

**Certificate of Service**

I, Daniel I. Smulow, hereby certify that on June 22, 2004, I served a true copy of this document by first class mail to: Michael J. Traft, Esq., Carney & Bassil, 20 Park Plaza, Suite 1405, Boston, MA 02116.

/s/ Daniel I. Smulow